IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
November 5, 2009 Session

GEORGE M. MCMILLAN, JR., ET AL. v. TOWN OF SIGNAL MOUNTAIN PLANNING COMMISSION, ET AL.

Appeal from the Chancery Court for Hamilton County
No. 08-0965 William Frank Brown, Chancellor

No. E2009-01254-COA-R3-CV - FILED NOVEMBER 23, 2009

George M. McMillan, Jr., et al.[1] ("Plaintiffs") sued the Town of Signal Mountain Planning Commission, et al. ("Planning Commission") and the Town of Signal Mountain, et al. ("Town of Signal Mountain")[2] contesting the proposed annexation of areas known as the Fox Run subdivision and the Windtree subdivision. The complaint sought both *quo warranto* relief against the Town of Signal Mountain, and declaratory judgment relief against the Planning Commission. The defendants filed a partial motion to dismiss under Tenn. R. Civ. P. 12.02(6). After a hearing the Trial Court dismissed Plaintiffs' declaratory judgment claim against the Planning Commission and certified the order as final pursuant to Tenn. R. Civ. P. 54.02. Plaintiffs appeal the dismissal of their declaratory judgment claim against the Planning Commission. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., and JOHN W. MCCLARTY, J.J., joined.

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[1] Plaintiffs include George M. McMillan, Jr.; Joanne Denise; Marc S. Theisen; Delton Griffith; Brent Morris; Celeste Morris; Bonnie R. Adams; Lester L. Wallace; Lois K. Wallace; Allen Upton; and Jayme Upton; individually and as aggrieved residents of Fox Run subdivision and Windtree subdivision.

[2] The Complaint lists two groups of defendants: 1) Town of Signal Mountain Planning Commission; John Trimpey (Chairman); Wells Blake (Vice-Chairman); Lou Oliphant (Secretary); Don Moon (Board Member); Melissa Cantrell (Board Member); Jeff Duncan (Board Member); Van Bunch (Board Member); Wayne Williams (Board Member); Paul M. Hendricks (Former Mayor & Board Member); and Annette Allen (Board Member & Councilwoman); in their official capacities; and, 2) Town of Signal Mountain; Bill Lusk (Mayor); Paul M. Hendricks (Councilman); Hershel Dick (Councilman); Susan Robertson (Vice-Mayor); and Annette Allen (Councilwoman); in their official capacities.

Gary W. Starnes, Chattanooga, Tennessee for the Appellants, George M. McMillan, Jr.; Joanne Denise; Marc S. Theisen; Delton Griffith; Brent Morris; Celeste Morris; Bonnie R. Adams; Lester L. Wallace; Lois K. Wallace; Allen Upton; and Jayme Upton.

Phillip A. Noblett, Chattanooga, Tennessee for the Appellees, Town of Signal Mountain Planning Commission; John Trimpey (Chairman); Wells Blake (Vice-Chairman); Lou Oliphant (Secretary); Don Moon (Board Member); Melissa Cantrell (Board Member); Jeff Duncan (Board Member); Van Bunch (Board Member); Wayne Williams (Board Member); Paul M. Hendricks (Former Mayor & Board Member); Annette Allen (Board Member & Councilwoman).

OPINION

Background

In 2001, the Town of Signal Mountain adopted urban growth boundaries, pursuant to Tenn. Code Ann. § 6-58-101, *et seq.*, which, among other things, delineated areas for potential future annexation including the Fox Run and the Windtree subdivisions. In July of 2008, the Town of Signal Mountain created proposed plans of services for Fox Run and Windtree and then submitted the plans to the Planning Commission for study and report pursuant to Tenn. Code Ann. § 6-51-102. The Planning Commission held two public hearings on the proposed plans of services. During those hearings members of the Planning Commission allegedly expressed reservations about aspects of the plans and also expressed a lack of understanding of the reasonableness requirements contained in Tenn. Code Ann. § 6-51-102. The Planning Commission allegedly sought advice from the Town of Signal Mountain's attorney, but the attorney allegedly "failed to properly instruct and delineate" the statutory requirements. After the public hearings, the Planning Commission approved the proposed plans of services.

In November of 2008, the Town of Signal Mountain passed two ordinances ordering the annexation of the Fox Run and Windtree subdivisions and adopting the proposed plans of services. The Plaintiffs, who reside in either Fox Run or Windtree, filed this lawsuit, which included two separate causes of action: 1) a *quo warranto* action against the Town of Signal Mountain, and, 2) a declaratory judgment action against the Planning Commission. The defendants filed a partial motion to dismiss. The Trial Court held a hearing and entered its order on January 28, 2009 granting the motion to dismiss, in part, and denying it, in part. As pertinent to this appeal, the Trial Court dismissed the declaratory judgment action against the Planning Commission. The Trial Court later entered an order certifying its January 28, 2009 order as a final judgment pursuant to Tenn. R. Civ. P. 54.02. Plaintiffs appeal the dismissal of their declaratory judgment action against the Planning Commission.

Discussion

Although Plaintiffs raise two issues on appeal, the dispositive issue is whether the Trial Court erred in dismissing Plaintiffs' declaratory judgment claim against the Planning Commission.

Our Supreme Court has recently reiterated the standard of review with regard to Tenn. R. Civ. P. 12 motions to dismiss stating:

> A Rule 12.02(6) motion under the Tennessee Rules of Civil Procedure seeks to determine whether the pleadings state a claim upon which relief may be granted. *Edwards v. Allen*, 216 S.W.3d 278, 284 (Tenn. 2007). Such a motion tests only the legal sufficiency of the complaint, not the strength of the proof. The resolution of the motion is determined by an examination of the pleadings alone. *Cook ex rel. Uithoven v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994) (citing *Wolcotts Fin. Servs., Inc. v. McReynolds*, 807 S.W.2d 708, 710 (Tenn. Ct. App. 1990)). For purposes of analysis, the motion contemplates that all relevant and material allegations in the complaint, even if true and correct, do not constitute a cause of action. In considering a motion to dismiss, courts must construe the assertions in the complaint liberally; the motion cannot be sustained unless it appears that there are no facts warranting relief. *Cook*, 878 S.W.2d at 938 (citing *Fuerst v. Methodist Hosp. S.*, 566 S.W.2d 847, 848-49 (Tenn. 1978)). On appeal, all allegations of fact by the Plaintiffs must be taken as true. *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997). Our scope of review is de novo with no presumption of correctness. *Colonial Pipeline Co. v. Morgan*, 263 S.W.3d 827, 836 (Tenn. 2008); *Owens v. Truckstops of Am.*, 915 S.W.2d 420, 424 (Tenn. 1996).

Highwoods Props., Inc. v. City of Memphis, No. W2007-00454-SC-R11-CV, 2009 Tenn. LEXIS 487 at **9-10 (Tenn. July 27, 2009).

We believe *Highwoods Properties* is dispositive of the issue before us on appeal. In *Highwoods Properties*, our Supreme Court instructed:

> The right to challenge an annexation is thus a "statutory right" that "in its very origin is limited." *Brent v. Town of Greeneville*, 203 Tenn. 60, 309 S.W.2d 121, 123 (Tenn. 1957). We have stated that "[w]ithin the four corners of [the *quo warranto*] statute lies the entire jurisdiction and authority of the Courts to review the actions of municipalities in enacting annexation ordinances." *City of Oak Ridge v. Roane County*, 563 S.W.2d 895, 897 (Tenn. 1978). Thus, "the courts have no power to vacate an annexation ordinance for purely procedural defects," because no such authority has been granted by statute. *City of Watauga v. City of Johnson City*, 589 S.W.2d 901, 906 (Tenn. 1979). Rather, the general rule is that defects in an

annexation ordinance must be presented in the context of a challenge to its reasonableness or necessity by way of a timely *quo warranto* challenge. *City of Oak Ridge*, 563 S.W.2d at 898; *see also City of Knoxville v. State ex rel. Graves*, 207 Tenn. 558, 341 S.W.2d 718, 721 (Tenn. 1960) (holding that allegation that ordinance was passed without a public hearing "should be considered in connection with the question of the reasonableness of the ordinance.").

In *State ex rel. Earhart v. City of Bristol*, however, we recognized an exception (other than a constitutional challenge) to the rule and held that, in certain situations where no *quo warranto* action is statutorily available, it is permissible to challenge an ordinance's validity with a declaratory judgment action. 970 S.W.2d at 953. In *Earhart* the validity of an ordinance enacted several years earlier was challenged because the annexed area contained no "people, private property, or commercial activity." *Id*. at 954; *see State ex rel. Collier v. City of Pigeon Forge*, 599 S.W.2d 545, 547 (Tenn. 1980) ("[L]ong and lean … annexations, so long as they take in people, private property, or commercial activities and rest on some reasonable and rational basis, are not per se to be condemned." (emphasis added)). Annexations containing no people, private property, or commercial activities by necessity, cannot be challenged in a *quo warranto* action, because only an "aggrieved owner of property that borders or lies within territory that is the subject of an annexation ordinance prior to the operative date thereof" may file such a challenge. Tenn. Code Ann. § 6-51-103(a)(1)(A) (emphasis added). We held, therefore, that the action for declaratory judgment was permissible, but limited our holding in two key ways. First, we permitted only challenges to ultra vires acts, that is, tests of "[t]he validity of an annexation ordinance alleged to exceed the authority delegated by the legislature." *Earhart*, 970 S.W.2d at 954. Second, we stated that it is only "where the *quo warranto* proceeding is not available, [that] alternative equitable remedies are not barred." *Id*. at 952 (citing 65 Am. Jur. 2d *Quo Warranto* § 7 (1972) ("[W]here the remedy by *quo warranto* is available, it is usually held that there is no concurrent remedy in equity, unless by virtue of statutory provision.")) (emphasis added).

* * *

We completely agree with the assessment of the Court of Appeals that our limited holding in *Earhart* did not overrule the longstanding principle, articulated in those cases, that Tennessee courts have no authority to vacate an annexation based on procedural defects, except insofar as those defects bear on the questions presented in a timely *quo warranto* action.

* * *

> "Subject to some exceptions, a declaratory judgment action should not be considered where special statutory proceedings provide an adequate remedy." *Colonial Pipeline*, 263 S.W.3d at 838 (citing *Katzenbach v. McClung*, 379 U.S. 294, 296, 85 S. Ct. 377, 13 L. Ed. 2d 290 (1964)).… The Plaintiffs - - having allowed their special statutory [*quo warranto*] action to expire - - are not entitled to a second bite of the apple under the Declaratory Judgment Act. The *quo warranto* procedures established by the General Assembly are the product of over half a century of experience and reflect a careful balance between the interests of municipalities and the concerns of individuals who object to the annexation of their property. This legislative remedy "avoid[s] the specter of numerous successive suits by private parties attacking the validity of annexations," "because the judgment settles the validity of the annexation on behalf of all property holders in the affected area." *Earhart*, 970 S.W.2d at 952 (quoting *Alexander Oil Co. v. City of Seguin*, 825 S.W.2d 434, 437 (Tex. 1991)). To sustain the propriety of this litigation would permit the piecemeal litigation that the *quo warranto* procedures are designed to prevent. We do not believe that the General Assembly intended to permit such a result.

Id. at **32-37.

In the case now before us on appeal, Plaintiffs have a *quo warranto* action available to them, and indeed, they have filed such an action. Even if all relevant and material allegations in the complaint are true and correct, under *Highwoods Properties*, Plaintiffs cannot maintain a declaratory judgment action. As such, we find no error in the Trial Court's dismissal of Plaintiffs' claim against the Planning Commission, and we affirm the Trial Court's January 28, 2009 order.[3]

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellants, George M. McMillan, Jr.; Joanne Denise; Marc S. Theisen; Delton Griffith; Brent Morris; Celeste Morris; Bonnie R. Adams; Lester L. Wallace; Lois K. Wallace; Allen Upton; and Jayme Upton, and their surety.

D. MICHAEL SWINEY, JUDGE

[3] Plaintiffs request that if we affirm the Trial Court, we then give an advisory opinion concerning what "can be pursued in the present Quo Warranto action against the Town Council...." As that issue is not before us on appeal, we decline Plaintiffs' request.